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A Treaty in Conflict with Title VII: MacNamara v. Korean Air Lines from an International Human Rights Perspective

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NOTES AND COMMENTS

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I. INTRODUCTION

Direct foreign investment in the United States, including joint ventures as well as the outright purchase of American companies, increased dramatically in the past decade.[1] With the accompanying importation of foreign management and culture, questions naturally arise over how American workers will fare under their new foreign managers. A fundamental issue confronting United States policymakers is the degree to which foreign companies should be held to United States nondiscrimination standards.

In recent employment lawsuits, some foreign corporations have argued that commercial treaties, signed between 1946 and 1956,[2] exempt them from certain nondiscrimination standards in Title VII of the Civil Rights Act of 1964 ("Title VII").[3] These bilateral "Friendship, Commerce and Navigation" ("FCN") treaties state that foreign employers may hire executives and other essential personnel "of their

1. From 1982 to 1987, direct foreign investment in the United States more than doubled, jumping from just under $125 billion to nearly $262 billion. *Foreign Direct Investment Position in the U.S.*, U.S. BUREAU OF ECONOMIC ANALYSIS, SURVEY OF CURRENT BUSINESSES (Aug. 1988), *reprinted in* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES No. 1358 at 777 (109th ed. 1989).

2. During this period, the United States entered into these "friendship, commerce and navigation" treaties with 16 countries. For a good historical overview of the treaties from the perspective of their chief architect, see generally Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958) [hereinafter Walker, *Modern Treaties*]; Walker, *The Post-War Commercial Treaty Program of the United States*, 73 POL. SCI. Q. 57 (1957) [hereinafter Walker, *Post-War Treaty*]; Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373 (1956) [hereinafter Walker, *Provisions on Companies*]; Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229 (1956) [hereinafter Walker, *United States Practice*].

3. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, §§ 701-16, 78 Stat. 241, 253-57 (1964) (codified as amended at 42 U.S.C. § 2000e-17 (1982)).

choice."[4] In United States employment discrimination cases, foreign defendants have asserted that the FCN treaty provision conflicts with, and takes precedence over, certain Title VII protections.[5] The Circuit Court of Appeals for the Fifth Circuit agreed with this position in 1981, while the Sixth, Second, and Third Circuit Courts of Appeals subsequently rejected it, leaving the courts in conflict over the reach of the FCN treaty hiring provision.[6]

This Note critiques the Third Circuit's recent analysis of the issue in *MacNamara v. Korean Air Lines*.[7] In December 1988, the court held that an American executive replaced by a South Korean national could maintain a Title VII discrimination claim against a Korean corporation.[8] The court concluded that the FCN treaty between Korea and the United States did not conflict with Title VII and the treaty provided only limited hiring protections for foreign corporations.[9]

In analyzing the *MacNamara* decision, this Note urges United States courts to incorporate international human rights law into their analysis of bilateral treaties. It suggests the United States should not relinquish its position as a leader in promoting fair employment practices. This author first reviews the history of the FCN treaties and prior cases addressing the FCN treaty–Title VII conflict. This Note then criticizes the *MacNamara* decision and traditional methods of treaty interpretation as unreliable, because both excessively defer to the State Department and ignore the views of United States treaty partners.[10]

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4. *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, United States–Korea, art. VIII(1), 8 U.S.T. 2217, 2223 T.I.A.S. No. 3947 [hereinafter Korean FCN Treaty]. The treaty reads in pertinent part:

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice*. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

Id. (emphasis added).

5. *See infra* text accompanying notes 32, 36, 45, 61-62.

6. *See infra* text accompanying notes 31, 37, 46, 72.

7. 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989).

8. *Id.* at 1147.

9. *Id.* at 1145-47.

10. *See infra* text accompanying notes 108-34.

This Note advocates an alternative approach: A greater use of international human rights law and nondiscrimination standards in treaty interpretation. Incorporating international fair employment standards would help deflect charges by trading partners that United States courts are simply imposing American legal and cultural norms on foreign employers.[11] This approach could enhance enforcement of human rights worldwide and help remove any competitive advantages gained by countries that rigidly control their workers.[12]

II. BACKGROUND

A. *Historical Overview of FCN Treaties and Their Employment Provisions*

Following World War II, the United States negotiated a number of FCN treaties, with the primary purpose of promoting American commercial interests abroad and encouraging the free international movement of investment capital.[13] Herman Walker, acknowledged as the chief architect of the FCN treaties, stated they provided a "ready-made framework"[14] that was easily negotiable with individual countries. The FCN treaties "all follow the same pattern"[15] and in many cases are worded identically.

Walker stated that a key purpose of the provision regarding employment privileges, such as article VIII(1) in the Korean FCN Treaty,[16] was to protect against "ultranationalistic policies" by the host country.[17] Specifically, the employment provision targeted so-called "percentile" laws.[18] A 1954 State Department telegram regarding the Netherlands FCN Treaty stated:

> The big problem to which the [provision] . . . was addressed was so-called percentile legislation, i.e., laws which stipulated that a fixed percentage of employees, by number of payroll, must be citizens. It was also occasioned by tendencies in some countries to forbid the hiring of such essential and specially trained personnel as accountants unless they were citizens, in situations in which sat-

11. *See infra* text accompanying notes 208-12.
12. *See infra* text accompanying notes 215-24.
13. Walker, *United States Practice*, *supra* note 2, at 229-31.
14. *Id.* at 230.
15. Blumenwitz, *Treaties of Friendship, Commerce and Navigation*, 7 ENCYCLOPEDIA OF PUBLIC INT'L LAW 484, 485 (1984).
16. *See* Korean FCN Treaty, *supra* note 4.
17. Walker, *Provisions on Companies*, *supra* note 2, at 386.
18. Walker, *United States Practice*, *supra* note 2, at 234; *see infra* text accompanying note 19.

isfactory native accountants simply were not available.[19]

However, several historical sources and the plain language of the FCN treaty employment provision indicate a broader purpose. Walker stated that article VIII(1) generally allows "free choice" in the selection of key personnel.[20] In addressing percentile laws in particular, Walker stated that "management is assured *freedom of choice* in the engaging of essential executive employees *in general*, regardless of their nationality, without legal interference from percentile restrictions *and the like*. . . ."[21]

A realistic reading of the employment provision requires consideration of the world economy during the early 1950s. Following World War II, the United States began to assert its economic and political clout worldwide.[22] Commercial treaties helped assure United States corporations they could control their expanding foreign operations. In defending the FCN treaties before Congress, State Department officials emphasized the extensive protections the treaties offered.[23] The broad language of article VIII(1) helped ensure corporate discretion in selecting key personnel and managing American investments in lesser developed countries such as Korea. Walker acknowledged the potentially "lopsided" nature of investment agreements in which only one of the parties had capital to export, but he concluded that by providing noninvestment benefits such as visa rights for merchants, balance and fairness was achieved in the FCN treaties.[24]

Walker set forth three standards of treatment between FCN treaty partners. The general treaty goal was "national treatment," meaning foreign companies would be treated equally with companies of the host nation.[25] A second standard, contingent on the rules of the host nation, was the "most-favored-nation treatment," which as-

19. Brief for the United States as Amicus Curiae on behalf of Appellant at 7, MacNamara v. Korean Air Lines, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1741)(citing Foreign Service Dispatch [sic] No. 144 from The Hague U.S. Embassy to Dep't of State, Aug. 16, 1954, at 4) (Supp. app. at 32)) [hereinafter State Dep't Amicus Brief].

20. Walker, *Provisions on Companies*, *supra* note 2, at 386 n.62.

21. Walker, *United States Practice*, *supra* note 2, at 234 (emphasis added).

22. *Id.* at 231.

23. One State Department official described the treaty as providing "the right of the owner to manage his own affairs and employ personnel of his choice. . . ." *Hearings before the Subcomm. of the Comm. on Foreign Relations*, 83d Cong., 1st Sess. 1, 2-3 (1953) [hereinafter *Hearings*].

24. Walker, *United States Practice*, *supra* note 2, at 244.

25. Walker, *Modern Treaties*, *supra* note 2, at 811.

sured treatment no less favorable than that received by other foreign companies.[26] The third measure, a rarely-used noncontingent standard, provided absolute protections, regardless of how domestic or other foreign firms were treated.[27]

The objective of the treaties was a "policy of equity and hospitality to the foreign investor."[28] However, Walker stated that article VIII(1) "technically goes beyond national treatment to prevent the imposition of ultranationalistic policies."[29] This explanation, coupled with the provision's unqualified "of their choice" language, indicates the FCN treaty employment provision was a noncontingent or absolute rule. Had the drafters intended, they could have easily subjected corporations to the employment laws of the host nation.

*B. Pre-*MacNamara *Caselaw on the Scope of the FCN Treaty Employment Provision*

Prior to the *MacNamara* decision in 1988, the Second, Fifth, and Sixth Circuit Courts of Appeals addressed the FCN treaty–Title VII conflict but reached different results. Also prior to the *MacNamara* decision, the Supreme Court dodged an opportunity to end the dispute over the reach of the FCN treaty employment provision when it heard *Sumitomo Shoji Inc. v. Avagliano*.[30]

1. *Spiess v. C. Itoh & Co.*

In 1981, the Fifth Circuit Court of Appeals in *Spiess v. C. Itoh & Co.*[31] attempted to reconcile United States anti-discrimination laws with provisions of the Japanese FCN Treaty.[32] American employees of C. Itoh[33] filed a class action suit alleging discrimination; however, the Japanese owner claimed the FCN employment provision provided total discretion in hiring key personnel.[34]

The Fifth Circuit concluded that the provision permitted Japanese companies to discriminate in favor of their own citizens when

26. *Id.*
27. *Id.*
28. Walker, *United States Practice*, *supra* note 2, at 230.
29. Walker, *Provisions on Companies*, *supra* note 2, at 386.
30. 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982).
31. 643 F.2d 353 (5th Cir. 1981).
32. *Id.*
33. C. Itoh & Company (America) was incorporated in New York, but was completely owned by a Japanese corporation. *Id.* at 355.
34. *Id.*

hiring key personnel without regard to American employment laws.[35] The court pointed out that the overriding goals of the FCN treaty were to provide a stable environment for American investment abroad and to avoid interference from domestic employment laws.[36] The court cited a general rule that subsequent federal legislation will invalidate a treaty obligation only if congressional intent to do so is clearly expressed.[37] Since Congress never addressed the FCN treaty in Title VII, the court refused to invalidate the treaty's employment provision.[38]

2. *Sumitomo Shoji Inc. v. Avagliano*

In 1981, the Court of Appeals for the Second Circuit in *Avagliano v. Sumitomo Shoji Inc.*[39] held that the same FCN treaty with Japan did not exempt Sumitomo Shoji from Title VII, but did allow it to hire based on considerations of national origin.[40] The court concluded that Title VII's narrow "bona fide occupational qualification" ("BFOQ") exception applied.[41] Under this exception, the employment of a Japanese citizen must be "reasonably necessary to the successful operation of its business [in the United States]."[42] For example, the employment decision could be justified by factors such as the employee's knowledge of Japanese products, markets, language, and culture.[43]

The Supreme Court vacated the decision on different grounds.[44] It held that the wholly-owned subsidiary was not a Japanese corporation and therefore was not protected under the FCN treaty.[45] The Court stated that the general purpose of the FCN treaties "was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis

35. *Id.* at 362.

36. *Spiess*, 643 F.2d at 359-60.

37. *Id.* at 362 (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963)).

38. *Id.*

39. 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982).

40. *Id.* at 559.

41. *Id.* The BFOQ exception is set forth in 42 U.S.C. § 2000-2(e)(1) (1982).

42. *Id.*

43. *Id.* Other factors include the employee's "familiarity with the personnel and workings of the principal or parent enterprise in Japan, and [the employee's] acceptability to those persons with whom the company . . . does business." *Id.*

44. Sumitomo Shoji Inc. v. Avagliano, 457 U.S. 176 (1982).

45. *Id.* at 187-88.

without suffering discrimination based on their alienage."[46] The Court, however, expressed no view on whether employment of a foreign national would be protected under a BFOQ exception.[47]

3. *Wickes v. Olympic Airways*

In 1984, following the *Sumitomo* decision, the Sixth Circuit Court of Appeals in *Wickes v. Olympic Airways*[48] rejected the treaty interpretation given by the *Spiess* court.[49] The *Wickes* court instead held that the foreign defendant had no privilege to discriminate against or among non-Greek citizens on the basis of race, sex, or national origin.[50] The plaintiff in *Wickes* claimed the Greek-owned airline violated Michigan's anti-discrimination laws by firing him on the basis of age and national origin.[51] Olympic Airways claimed immunity under an FCN treaty.[52]

Stating that the court's role was to give effect to the intent of the treaty parties,[53] the Sixth Circuit concluded the treaty's drafters only envisioned a narrow privilege to employ Greek citizens for certain high level positions and not wholesale immunity from compliance with American labor laws.[54] This holding repeated the State Department's narrow reading that percentile laws were the target of the treaty's employment provisions.[55] Although the Sixth Circuit acknowledged the absolutist and unqualified language of the FCN treaty provision, it concluded the treaty and Michigan's anti-discrimination laws did not conflict.[56] Therefore, foreign employers could discriminate based on citizenship, but not for reasons of national origin, age, race, or sex.[57]

In summary, the pre-*MacNamara* decisions of *Spiess*, *Sumitomo*, and *Wickes* reveal the conflict among the circuit courts regarding the reach of the employment provisions of FCN treaties. The *Wickes* court interpreted the provision as providing less hiring discretion than

46. *Id.*
47. *Id.* at 189 n.19.
48. 745 F.2d 363 (6th Cir. 1984).
49. *See supra* text accompanying notes 31-38.
50. *Wickes*, 745 F.2d at 369.
51. *Id.* at 364.
52. *Id.* at 365.
53. *Id.* (quoting Sumitomo Shoji Inc. v. Avagliano, 457 U.S. 176, 185 (1982)).
54. *Id.*
55. *Wickes*, 745 F.2d at 367.
56. *Id.* at 368. In such a conflict, the treaty would prevail.
57. *Id.* at 368-69.

that contemplated in *Spiess*.[58] The Supreme Court, although commenting on some sub-issues, declined in *Sumitomo* to rule on the broader subject of the apparent FCN treaty–Title VII conflict.[59] After considering these prior decisions, the *MacNamara* court followed the approach of the *Wickes* court.

III. *MACNAMARA V. KOREAN AIR LINES*

A. Facts

Plaintiff Thomas MacNamara, a 57-year-old white American male, was employed by Korean Air Lines ("KAL") as a district sales manager, based in Philadelphia.[60] He began working with KAL in 1974, and in 1977 was promoted from salesperson to district sales manager for Delaware, Pennsylvania, and southern New Jersey.[61] KAL fired MacNamara on June 15, 1982 and replaced him with a 42-year-old Korean citizen who had been in charge of KAL's Washington, D.C. office.[62]

In November 1982, MacNamara filed suit under Title VII and the Age Discrimination in Employment Act of 1967 ("ADEA").[63] He alleged KAL discriminated against him on the basis of his race, national origin, and age.[64] In response, KAL claimed immunity under article VIII(1) of the Korean FCN Treaty.[65] KAL pointed to treaty language stating that companies of Korea and the United States could "engage" executives and other key personnel "of their choice."[66] KAL thus asserted it had complete freedom to hire and remove such personnel, regardless of United States anti-discrimination laws.[67]

MacNamara, joined by the United States in amicus,[68] sought a much narrower reading of the treaty provision. Article VIII(1), MacNamara argued, only granted foreign businesses the right to se-

58. *Id.* at 363.
59. *Sumitomo*, 457 U.S. at 187-88.
60. MacNamara v. KAL, 863 F.2d 1135, 1137 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989).
61. *Id.*
62. *Id.* at 1138.
63. *Id.*
64. *Id.*
65. *MacNamara*, 863 F.2d at 1138.
66. MacNamara v. KAL, 45 Fair Empl. Prac. Cas. (BNA) 384, 389 (E.D. Pa. 1987), *rev'd*, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989).
67. *Id.* at 389-90.
68. State Dep't Amicus Brief, *supra* note 19, at 7.

lect key personnel on the basis of citizenship—but not age, race, or national origin.[69] In addition, MacNamara claimed the term "engage" allowed the hiring, but not firing of such personnel.[70] He also denied he was an executive with administrative duties and argued that his sales manager job was not the type of "essential" position over which treaty partners had been given greater discretion.[71]

The district court granted KAL's motion to dismiss, concluding that Title VII's nondiscrimination standards conflicted with the Korean FCN Treaty's broad hiring discretion and that the treaty language controlled.[72] Giving great weight to the treaty's plain language, the court held that the treaty gave KAL "free discretion" to hire and fire executives such as MacNamara.[73] The court noted that a similar FCN treaty with Pakistan limited the scope of the "of their choice" provision by adding the qualifier "in accordance with the applicable laws."[74] The qualifier in the Pakistani treaty suggests that foreign employers must meet domestic standards. The district court stated that the absence of this additional qualifying language in the Korean treaty indicated an "unfettered" right to select key personnel.[75]

B. Reasoning of the Appellate Court

1. General Treaty Interpretation Approach

The Court of Appeals for the Third Circuit reversed,[76] concluding that the treaty did not override Title VII.[77] The court viewed its role as "limited to ascertaining and enforcing the intent of the Treaty parties."[78] The treaty's literal meaning would control unless its application produced a "result inconsistent with the intent or expectations of signatories."[79] The court sought to reconcile the treaty and United States domestic law to avoid finding a conflict.[80] The court stated that

69. *MacNamara*, 863 F.2d at 1138. The court stated that national origin refers to the place of birth or home of one's ancestors, which it distinguished from citizenship. *Id.* at 1147 (citing Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973)).

70. MacNamara v. KAL, 45 Fair Empl. Prac. Cas. (BNA) at 385.

71. *Id.*

72. *Id.* at 389.

73. *Id.* The court stated that "neither Title VII nor the ADEA abrogated those Treaty obligations and the Treaty has to be recognized as a narrow exception to them." *Id.* at 390.

74. *Id.* at 387.

75. MacNamara v. KAL, 45 Fair Empl. Prac. Cas. (BNA) at 387.

76. *MacNamara*, 863 F.2d at 1147.

77. *Id.*

78. *Id.* at 1143 (citing Sumitomo Shoji Inc. v. Avagliano, 457 U.S. 176, 185 (1982)).

79. *Id.* (quoting Maximov v. United States, 373 U.S. 49, 54 (1963)).

80. *Id.* at 1144.

federal statutes and the FCN treaty should be interpreted to "effectuate the purpose of both while not sacrificing the terms of either."[81] If the two could not be reconciled, "the treaty must prevail" over subsequent legislation unless Congress clearly expressed an intent that the legislation affect existing treaty rights.[82] In addition, the Third Circuit noted that courts have traditionally given "great weight" to the State Department's reading of treaties since the department is generally responsible for treaty negotiation and enforcement.[83]

2. Treaty History and Analysis

In applying this interpretive approach to the facts of the case, the Third Circuit accorded great weight to the State Department's view that the driving impetus behind the treaty's employment provision was the avoidance of "percentile" laws.[84] These laws, requiring American companies abroad to hire a certain percentage of host-nation citizens, were described as the "target" of article VIII(1), despite plain language suggesting otherwise.[85] The court cited the State Department's view that article VIII(1) created only a "limited privilege" and not a "broad exemption from laws that prohibit discrimination on grounds unrelated to citizenship."[86]

The court acknowledged that the broad "of their choice" language of the employment provision assured more than "national treatment," meaning treatment equal to that of domestic corporations.[87] However, the court rejected KAL's view that the airline should be free from judicial scrutiny of its motives in selecting Koreans for executive positions.[88] The Third Circuit concluded foreign companies should not receive such broad hiring discretion, since such discretion would provide an unfair competitive advantage over American corporations, which often had to justify their hiring decisions in court.[89]

The Third Circuit also rejected the district court's rationale that the plain meaning of the treaty should prevail and the absence of

81. *MacNamara*, 863 F.2d at 1144 (citing Whitney v. Robertson, 124 U.S. 190 (1888)).
82. *Id.* at 1146 (citing Kolovrat v. Oregon, 366 U.S. 187, 194 (1961)).
83. *Id.* (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963)).
84. *Id.* at 1144.
85. *Id.*
86. *MacNamara*, 863 F.2d at 1141.
87. *Id.* at 1143.
88. *Id.* at 1144.
89. *Id.* at 1146 (citing Sumitomo Shoji Inc. v. Avagliano, 457 U.S. 176, 187-88 (1982)).

available qualifying language showed an intent for broad protections.[90] The district court had relied on a similar Pakistani FCN Treaty which stated that foreign corporations could hire key personnel of their choice, but included the qualifier "in accordance with the applicable laws."[91] The district court argued that the absence of this limiting language in the Korean treaty indicated Korean corporations had an "unconditional" freedom of choice regarding essential personnel.[92] The Third Circuit rejected this argument, concluding that the narrow goal of curbing the abusive percentile laws guided the original treaty negotiators.[93] Thus, KAL did not have the right to fire MacNamara based on age or national origin.

In addition to rejecting the district court's interpretive approach, the Third Circuit also found "no logical conflict" between the FCN treaty and either Title VII or the ADEA.[94] It construed the treaty as allowing the selection of essential personnel based on citizenship.[95] However, Title VII and the ADEA prevented discrimination based on age, race, and national origin.[96] The court concluded that "national origin discrimination and citizenship discrimination are distinct phenomena."[97] It cited *Espinoza v. Farah Mfg. Co.*[98] for the proposition that Title VII did not bar discrimination based specifically on citizenship.[99]

Distinguishing between citizenship discrimination and national origin discrimination would not be a problem for triers of fact, the court concluded.[100] It found inherent in the history of Title VII a congressional determination that a trier of fact could distinguish between the two forms of discrimination.[101] Plaintiffs would have the

90. *Id.* at 1145.

91. MacNamara v. KAL, 45 Fair Empl. Prac. Cas. (BNA) at 387 (citing Treaty of Friendship and Commerce, Nov. 12, 1959, United States–Pakistan, art. VIII, 12 U.S.T. 110-14, T.I.A.S. 4683).

92. *Id.*

93. *MacNamara*, 863 F.2d at 1145.

94. *Id.* at 1146.

95. *Id.*

96. *Id.*

97. *Id.* The court chose not to address the BFOQ exception which is a possible method of avoiding a conflict between Title VII and article VIII(1). *See supra* text accompanying notes 36-41.

98. 414 U.S. 86, 88, 94 (1973).

99. *MacNamara*, 863 F.2d at 1147. The *Espinoza* Court held that nothing in the Civil Rights Act of 1964 made it illegal to discriminate on the basis of citizenship or alienage. 414 U.S. at 95.

100. *MacNamara*, 863 F.2d at 1147.

101. *Id.*

burden of showing that "but for" race, age, or national origin, they would not have been terminated.[102]

Another potential problem addressed by the court was the possibility that the threat of discrimination suits would deter foreign investors.[103] However, the court concluded that unrestricted hiring discretion would give foreign corporations an unfair competitive advantage, since "defending personnel decisions is a fact of business life in contemporary America."[104]

Despite holding that MacNamara could bring a discrimination claim, the court rejected MacNamara's argument that KAL's liability could be based on a mere showing that its hiring practices had a discriminatory effect.[105] To prevail, a plaintiff must prove the foreign employer *intended* to discriminate.[106] Otherwise, the court reasoned, corporations from countries with homogeneous populations, such as Korea, could be subjected to excessive claims based on an unavoidable appearance of discrimination.[107] Disparate impact evidence could be used, the court suggested, but not without regard to the employer's subjective intent.[108] This restriction and the plaintiff's rigorous burden of proof offset the court's general holding that MacNamara could maintain a discrimination suit against KAL.

IV. ANALYSIS

A. Treaty Interpretation

The Third Circuit in *MacNamara* downplayed the importance of the plain meaning of the FCN treaty's actual text. By focusing instead on the intent of the signatories, the court attempted to avoid confronting the clear language of the treaty.[109] But recent caselaw addressing treaty interpretation reiterates the central importance of treaty language.[110]

Echoing the caselaw, the *Restatement (Revised) of the Law of Foreign Relations* states that treaties are to be interpreted in accord-

102. *Id.* at 1147 n.15.
103. *Id.* at 1147.
104. *Id.*
105. *MacNamara*, 863 F.2d at 1148.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 1143.
110. *See, e.g.*, Air France v. Saks, 470 U.S. 392, 398 (1985).

ance with the "ordinary meaning" of their terms.[111] Although treaty interpretation has traditionally incorporated sources beyond plain language,[112] the *MacNamara* court's approach was extreme, virtually dismissing the plain meaning entirely. With the Korean FCN Treaty, the plain language is particularly significant, because, as KAL noted, the United States negotiators were capable of qualifying the broad protections of article VIII(1) had they chosen to do so.[113]

In general, however, determining the precise meaning of treaty provisions is inherently problematic.[114] First, treaty language is often generalized and subject to more than one interpretation.[115] General treaty language may actually have a very specific meaning, negotiated and informally agreed upon by the parties.[116] Despite the interpretive rules set forth by the Restatement and Vienna Convention[117] regarding the weight to be accorded treaty language, courts do not follow

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111. RESTATEMENT (REVISED) OF THE LAW OF FOREIGN RELATIONS § 325 (Tent. Draft No. 6, 1985). Section 325 reads:

(1) An international agreement is to be interpreted in good faith in accordance with the *ordinary meaning* to be given to its terms in their context and in light of its objects and purpose.

(2) Any subsequent agreement between parties regarding the interpretation of the agreement, or *subsequent practice* between the parties in the application of the agreement is to be taken into account in interpreting the agreement.

Id. (emphasis added). Thus, Restatement section 325 sets forth the following guidelines: 1) courts should interpret treaties liberally and in good faith; 2) courts should interpret treaties according to the ordinary meaning of their terms; and 3) courts should give substantial weight to the signatories' practical construction of the treaty. *Id.*

112. *See* Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32 (1943). "[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Id.*

113. *See supra* text accompanying notes 89-92.

114. *See* Vandevelde, *Treaty Interpretation from a Negotiator's Perspective*, 21 VAND. J. TRANSNAT'L L. 281, 287-97 (1988).

115. *Id.* at 287-88.

116. *Id.* at 308; *see also* Comment, *The Jurisprudence of Treaty Interpretation*, 21 U.C. DAVIS L. REV. 1023 (1988) [hereinafter Comment, *Jurisprudence*]. The author states that treaty drafters often view a vague treaty as a first step toward a more workable future document because "a vague treaty is better than no treaty." *Id.* at 1065.

117. Vienna Convention on the Law of Treaties, May 23, 1969, Rule 32, arts. 31, 32, *reprinted in* 8 I.L.M. 679. Article 31 of the Vienna Convention states:

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objective and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connexion with the

these rules with any consistency.[118]

Another source for treaty interpretation, transcripts of Senate ratification hearings, received little attention from the *MacNamara* court because of its deference to the State Department's amicus brief, which focused on the treaty's negotiating history.[119] As KAL demonstrated in its appellate brief, treaty discussions in the Senate are subject to multiple interpretations.[120] Since the Senate largely plays an advisory role in treaty ratification, its actual intent may be unknown particularly where Senators disagree over various provisions.[121]

During a typical hearing, the State Department urges passage and provides assurances, while the Senators ask only general questions.[122] One commentator observed: "A legislator, having no particular interest in the legislation, whether treaty or domestic statute, might not speak with a committee member, attentively listen to debate, read the committee report, and heaven forbid, might not even read the bill or treaty before casting her vote."[123]

Rather than looking to the Senate hearings or treaty text, the *MacNamara* court focused on the negotiating history and writings of the treaty drafters to discern the parties' intent.[124] The court relied on the State Department's amicus brief, the writings of treaty drafter Herman Walker, and the reasoning of the Sixth Circuit in *Wickes*.[125] It embraced the view of the State Department and the *Wickes* court

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conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Id. at 691-92. Although the United States is not a party to the Vienna Convention, it considers it to be evidence of customary international law.

118. *See* Vandevelde, *supra* note 114, at 297.

119. 863 F.2d 1135; *see supra* text accompanying notes 184-86.

120. Brief for Appellee at 12, 13, 26, 27, 29, 36, 42, 43, MacNamara v. Korean Air Lines, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1741).

121. Comment, *Jurisprudence*, *supra* note 116, at 1034.

122. *See, e.g.*, *Hearings*, *supra* note 23.

123. Comment, *Jurisprudence*, *supra* note 116, at 1035 (citing Immigration and Naturalization Serv. v. Chada, 462 U.S. 919, 997 (1982) (White, J., dissenting)).

124. *MacNamara*, 863 F.2d at 1141-46.

125. *Id.*; *see supra* text accompanying notes 14-19, 48-59.

that the FCN treaties were drafted only to provide narrow protections from percentile legislation.

For the *MacNamara* court, and for judges and attorneys in general, histories of treaty negotiations present great difficulties. Where meanings agreed upon by negotiators are not explicit in the text, lawyers may be forced to sift through numerous State Department memoranda and perhaps even contact the individual negotiators.[126] Information from negotiating sessions is often classified or unpublished and many foreign materials are also unavailable.[127] In addition, these historical sources may conflict.[128] Inevitably, as in *MacNamara*, the judicial system is forced to rely on the executive branch's interpretation of these materials and the court's analysis is skewed, reflecting policy shifts and political biases in the executive branch.

B. Deference to the State Department and National Bias

The Third Circuit's deference to the State Department's historical analysis is typical of American courts.[129] The agencies that negotiate treaties are the most knowledgeable about the drafters' intentions, as well as modern developments in international law, which often shape treaty interpretation.[130] In addition, the courts generally have deferred to the executive in matters of foreign policy.

Delegating treaty interpretation to the State Department may streamline the court's analysis, but it can lead to inconsistent results, which vary with diplomatic personnel and political changes.[131] The judiciary, by providing a more neutral forum, can enhance international acceptance of treaty-related decisions.[132]

One commentator has suggested that judicial criteria used to

126. Vandevelde, *supra* note 114, at 307-10; *see also* Comment, *Jurisprudence*, *supra* note 116, at 1041. "A legal system that places nearly dispositive weight on rules not generally known loses much of its ethical validity. Treaty interpretation that gives such weight to largely inaccessible evidence falls into the same category." *Id.*

127. Comment, *Jurisprudence*, *supra* note 116, at 1038 n.73.

128. *See, e.g.*, *Sumitomo*, 457 U.S. at 184 n.10. Two contradictory letters, both written after ratification by State Department lawyers, were admitted into evidence. The Court concluded "neither of these letters is indicative of the state of mind of the Treaty negotiators; they are merely evidence of the later interpretation of the State Department as the agency . . . charged with interpreting and enforcing the Treaty." *Id.*

129. Comment, *Jurisprudence*, *supra* note 116, at 1050; *see, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

130. Comment, *Jurisprudence*, *supra* note 116, at 1050-51.

131. *Id.*

132. *Id.* at 1051-52.

evaluate an agency's statutory interpretation may also apply to interpreting treaties.[133] These criteria include the period of time that has elapsed since a statute's adoption and whether the agency's interpretation has remained consistent.[134] Applying these criteria to *MacNamara* indicates the weight accorded the State Department's views was excessive. As KAL noted, the agency's FCN treaty interpretation changed from its reading in the *Wickes* case just four years earlier.[135] Further, some thirty years had elapsed since ratification, suggesting the State Department's views were less reliable and should have been more closely scrutinized by the court.

The *MacNamara* court focused on the views of United States diplomats and legislators and largely ignored the Korean government's interpretation of the treaty.[136] As a result, the court's conclusions about the drafters' intent carry a pro-American bias. The Supreme Court in *Sumitomo* emphasized the importance of incorporating the views of *both* treaty parties.[137] However, as *MacNamara* illustrates, in practice, American courts rarely address the interpretations of treaty partners, thereby producing a national bias.[138]

C. Treaty History

In adopting the State Department's version of the FCN treaties' negotiation history,[139] the Third Circuit minimized the acknowledged

133. *Id.* at 1049.

134. *Id.*

135. Brief for Appellee at 32-33, MacNamara v. KAL, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1714) (citing Brief for the United States as Amicus Curiae at 26 n.16, Sumitomo Shoji Inc. v. Avagliano, 457 U.S. 176 (1982)). In *Wickes*, the United States government's amicus brief stated that companies could "select top-level management without having to justify the decisions on a case-by-case basis." *Id.*

136. *See MacNamara*, 863 F.2d at 1146 n.13. The court of appeals stated that, unlike the district court, it saw no conflict between the respective views of the State Department and the Korean government. *Id.* The district court noted that the Korean Ministry of Foreign Affairs believed that the treaty prevailed over conflicting domestic laws. MacNamara v. KAL, 45 Fair Empl. Prac. Cas. (BNA) at 389.

137. Sumitomo Shoji Inc. v. Avagliano, 457 U.S. 176, 183-85 (1982).

138. Comment, *Jurisprudence*, *supra* note 116, at 1037-41. The author, however, qualifies his discussion of national bias. He asserts that "national bias is not inconsistent with the treaty interpretation role of domestic courts. American courts interpret treaties only to enforce domestic obligations. . . . Thus, the scope of the Court's treaty powers and duties does not extend beyond the nation's borders." *Id.* at 1038.

139. *See supra* text accompanying notes 124-30; *see also* Lansing & Palmer, *Sumitomo Shoji v. Avagliano: Sayonara to Japanese Employment Practices in Conflict with Title VII*, 28 ST. LOUIS U.L.J. 153, 156-57 (1984). The authors offer a more realistic assessment of the history of the FCN treaties, noting that only the United States could afford foreign investment.

purpose of the treaties—protection of United States business interests abroad. As the district court pointed out, limiting language was used in at least one other FCN treaty.[140] Had the treaty solely targeted percentile laws, the treaty drafters could have tailored the document specifically to prohibiting those laws. However, allowing American companies to hire personnel "of their choice" indicates the United States sought broader protections from potential domestic interference. To dismiss this broad reach and clear language simply because percentile laws were one target of the provision is extreme.

Both the *MacNamara* court and the State Department ignored the dramatic historical disparity in economic power between Korea and the United States. When the treaty was ratified in 1956, South Korea was rebuilding from war.[141] Stated one historian, "[d]uring the 1950s South Korea was heavily dependent upon aid, not only for its growth prospects, but also for its day-to-day function."[142] This "one-sided, rather than mutual, relationship of assistance and influence"[143] challenges the notion that the FCN treaty was freely negotiated between equals and intended as a reciprocal document. This further suggests that the employment provision was intended to have a broad reach to protect the economic interests of the stronger treaty partner.

In the mid-1950s, protections against employment discrimination were just beginning to emerge in the United States.[144] Title VII did not exist,[145] and only a few states had enacted employment discrimination statutes.[146] It is highly unlikely that the FCN treaty drafters ever contemplated a conflict between the treaty and future United

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See also Walker, *United States Practice*, *supra* note 2, at 234 (counter to the government's narrow view of article VIII(1)).

140. *See supra* text accompanying note 91.

141. *See* Park, *From Bilateralism to Multilateralism: Korea's Economic Relationship with the United States, 1945-1980*, in KOREA AND THE UNITED STATES: A CENTURY OF COOPERATION 243-46 (1984).

142. Chung, *The Development of the South Korean Economy and the Role of the United States*, in THE UNITED STATES–SOUTH KOREA ALLIANCE 191 (G. Curtis & S. Han ed. 1983).

143. Han, *South Korea and the United States: Past, Present and Future*, in THE UNITED STATES–SOUTH KOREA ALLIANCE 202 (G. Curtis & S. Han ed. 1983). Han concludes: "Although extremely close and generally cordial, the U.S.–South Korea relationship is characterized by a high degree of asymmetry, in the perceptions, objectives, capabilities, and influence of the two partners." *Id.*

144. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, §§ 701-16, 78 Stat. 241, 253-57 (1964) (codified as amended at 42 U.S.C. § 2000e-17 (1982)).

145. When the Senate was addressing the FCN treaties, nine states had laws prohibiting discrimination in employment. Schwartz, *Commercial Treaties in the American Civil Rights Laws*, 31 STAN. L. REV. 947, 951 n.23 (1979).

146. *Id.*

States nondiscrimination laws, much less a conflict arising from South Korean investment in this country.

What is really at work in the *MacNamara* case is the application of a double standard by the United States, enforced by its judicial system. As KAL argued before the court of appeals:

> Changes in the international marketplace, as well as changes in the social mores within the United States, may have caused the United States to regret the broad, but reciprocal, freedom it negotiated for corporations to exercise free discretion over who they hire to control foreign branch operations. Yet, if the United States did not intend for Korean corporations to be able to engage executives "of their choice," then the United States had a duty to convey that to the Korean negotiators clearly and unequivocally across the bargaining table. They did not, however, do so.[147]

The only way for the Third Circuit to avoid enforcing the clear, simple language of the FCN treaty was to limit its scope and find that it did not conflict with or prevail over domestic employment laws. The district court warned of the pitfalls of the strained historical analysis necessary to avoid the obvious treaty–Title VII conflict. It favored "construing the treaty language plainly and not contorting it to protect what is likely a relatively small number of persons who knowingly assume essential positions . . . ."[148]

D. An International Human Rights Law Perspective

The analysis offered by the Third Circuit degenerated into a narrow historical search for the intent of the treaty drafters. *MacNamara* demonstrates the manipulability of such methods of treaty interpretation. For example, KAL and MacNamara dueled with obscure State Department dispatches and Senate hearing transcripts as evidence of the drafters' intent, occasionally citing the same passages but finding opposite meanings.[149]

This traditional approach ignores the large body of international

147. Brief for Appellee at 24, MacNamara v. KAL, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1741).

148. MacNamara v. KAL, 45 Fair Empl. Prac. Cas. (BNA) at 391.

149. For example, the appellate briefs of both parties cited extensively from Senate Foreign Relations Committee hearings on July 13, 1953. Plaintiff cited the assurances of a State Department official that the FCN treaties would not encroach on the domestic legislative authority of the states as evidence that the treaties were not intended to override domestic employment laws. KAL cited the same passage, but argued that it applied only to state laws and not to employment discrimination law, which is subject to concurrent state and federal legislation. *See* Brief for Appellee at 26, MacNamara v. KAL, 863 F.2d 1135 (3d Cir. 1988) (No. 87-

human rights law that directly addresses fair employment standards.[150] Although the degree to which the United States is bound to such standards is unsettled, both the human rights agreements signed by the United States and the body of customary international standards regarding employment discrimination can be applied in United States courts.[151] The application of international human rights law naturally extends to interpreting treaties in cases such as *MacNamara*.

1. International Human Rights Agreements and the Interpretation of FCN Treaties

Although the United States has been slow to sign international human rights agreements,[152] it is a party to the Universal Declaration of Human Rights,[153] the United Nations Covenant on Civil and Polit-

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1741) and Brief for Appellant at 15, MacNamara v. KAL, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1741).

150. The United Nations Charter states that all member nations shall promote fundamental freedoms without discrimination as to race, sex, language, or religion. U.N. CHARTER art. 1, para. 3; arts. 55-56; *see also* Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948), *reprinted in* E. OSMANCZYK, THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INT'L AGREEMENTS 361-62 (1985); International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 220, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/16316 (1966); International Labour Organisation Convention (No. 111), *adopted* June 25, 1958, 362 U.N.T.S. 31 [hereinafter ILO Convention]. In 1958, the International Labour Organisation ("ILO"), in Convention 111 and Recommendation 111, adopted standards protecting workers against discrimination based on race, color, sex, religion, political opinion, national extraction, or social origin. The standards set forth by the ILO are similar to Title VII anti-discrimination standards in the United States. The ILO Convention allows for the promotion of fair employment in ways "appropriate to national conditions."

151. *See infra* text accompanying notes 178-201; *see, e.g.*, H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 290 (1986); *see also* R. FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW 212-35 (1981); Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9, 11 (1970); Note, *The Application of International Human Rights Arguments in United States Courts: Customary International Law Incorporated into American Domestic Law*, 8 BROOKLYN J. INT'L. L. 207, 216, 237-38 (1982) [hereinafter Note, *Customary International Law*]; Comment, *A Human Rights Approach to the Labor Rights of Undocumented Workers*, 74 CALIF. L. REV. 1715, 1738 (1986) [hereinafter Comment, *Undocumented Workers*]; Note, *In Pursuit of the Missing Link: International Workers Rights and International Trade?*, 27 COLUM. J. TRANSNAT'L L. 443, 444 (1989) [hereinafter Note, *Missing Link*].

152. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 CIN. L. REV. 367, 385 (1985) [hereinafter Lillich, *Invoking International Law*]. The United States has yet to sign several major human rights documents. For example, it has not signed the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

153. G.A. Res. 217, U.N. Doc. A/810, at 71 (1948), *reprinted in* E. OSMANCZYK, THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INT'L AGREEMENTS 361-62 (1985).

ical Rights,[154] the American Convention on Human Rights,[155] and the United Nations Charter.[156] Most of the human rights instruments the United States has adopted contain provisions which prohibit general forms of discrimination or specifically address employment discrimination.[157] In addition, the International Labour Organisation ("ILO"), in which South Korea has sought membership since 1985, sets forth nondiscrimination standards.[158]

The United States and South Korea should interpret the FCN treaty according to the anti-discrimination standards set forth in the human rights agreements to which they are parties. At a minimum, the courts can cite language from such agreements as persuasive authority to support rulings against discriminatory treaty interpretations.[159] However, courts have been reluctant to apply human rights law directly.

For example, in *Spiess*[160] the Fifth Circuit rejected the argument that discrimination allowed by an FCN treaty would violate a higher law imposed by the anti-discrimination language in article 55 of the United Nations Charter.[161] The court concluded that the human rights clauses of the United Nations Charter are not self-executing international obligations and that Title VII is legislation independent of the charter.[162]

This analysis echoed a line of cases following the 1950 California

154. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, *entered into force* Mar. 23, 1976, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

155. American Convention on Human Rights, *entered into force* July 18, 1978, O.A.S.T.S. No. 36.

156. U.N. CHARTER, *signed in* 1945, 59 Stat. 1031, T.S. No. 993, *reprinted in* 3 BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, 1153 (1970).

157. *See, e.g.*, U.N. CHARTER, arts. 55-56 (supporting fundamental freedoms without distinction as to race, sex, language, or religion).

158. ILO Convention, *supra* note 150. South Korea has sought membership in the ILO since 1985. *See ROK to Step Up Bid for ILO Membership in '86: Min Cho*, Korea Times, Nov. 16, 1986, at 8, col. 3.

159. Lillich, *Invoking International Law*, *supra* note 152, at 404-05; *see also* Paust, *Application of International Human Rights Standards by United States Courts*, 76 LAW LIBR. J. 496, 500-01 (1983).

160. 643 F.2d 353 (5th Cir. 1981).

161. *Id.* at 362-63.

162. *Id.* at 363. A treaty is considered "self-executing" if no domestic legislative action is required before it can be implemented. *See* Reinsenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at any Price?*, 74 AM. J. INT'L L. 892 (1980).

Supreme Court decision, *Sei Fujii v. California*.[163] Although "entitled to respectful consideration," the court concluded that the United Nations clauses were not intended to supersede existing laws in the United States.[164] The court reasoned in *Sei Fujii* that the human rights clauses were too vague to create international law that would be binding in American courts.[165] However, this early decision and its progeny[166] have been strongly criticized by a number of commentators.[167] They conclude that many international human rights agreements, such as the United Nations Charter, should be deemed self-executing and therefore directly applicable in American courts.[168]

Although a comprehensive review of this complex issue is beyond the scope of this Note, two general arguments for extending self-execution deserve mention. First, critics note that language in modern international human rights documents is often quite specific and no more indefinite than other treaties and constitutions applied by United States courts.[169] Second, the Supreme Court has held that courts should liberally interpret treaties in favor of protecting the rights claimed under them.[170] This suggests that United States courts may enforce portions of human rights documents, particularly those with growing worldwide acceptance—such as nondiscrimination provisions.[171] Otherwise, the "non-self-executing" label "leaves the par-

163. 38 Cal. 2d 718, 242 P.2d 617 (1952); *see generally* Hitai v. Immigration and Naturalization Serv., 343 F.2d 466, 468 (2d Cir. 1965); Davis v. Immigration and Naturalization Serv., 481 F. Supp. 1178, 1183 (D.D.C. 1979); Camacho v. Rogers, 199 F. Supp. 155, 158 (S.D.N.Y. 1961); Diggs v. Dent, Civ. No. 74-1292 (D.D.C. May 14, 1975), *reprinted in* 14 INT'L LEGAL MATERIALS 797, 804 (1975), *aff'd sub nom.*, Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976).

164. *Sei Fujii*, 38 Cal. 2d at 724-25, 242 P.2d at 621-22.

165. *Id.* at 724, 242 P.2d at 621.

166. *See, e.g.*, Camacho v. Rogers, 199 F. Supp. 155 (S.D.N.Y. 1961) and Diggs v. Dent, Civ. No. 74-1292 (D.D.C. May 14, 1975), *reprinted in* 14 I.L.M. 797, 804 (1975), *aff'd sub nom.*, Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976).

167. *See, e.g.*, Lockwood, *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901, 924-36 (1984); Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643 (1951); Note, *The Domestic Application of International Human Rights Law: Evolving the Species*, 5 HASTINGS INT'L & COMP. L. REV. 161, 194-96 (1981) [hereinafter Note, *Evolving the Species*].

168. *See* U.N. CHARTER, *supra* note 156; Comment, *Undocumented Workers*, *supra* note 151.

169. Lillich, *Invoking International Law*, *supra* note 152, at 376 n.44.

170. Asakura v. Seattle, 265 U.S. 332, 342 (1924).

171. *See* Lillich, *Invoking International Law*, *supra* note 152, at 377-79. For further discussion of the international acceptance of nondiscrimination standards, see text accompanying notes 186-88.

ties to a treaty with useless words. . . ."[172]

Despite such support among the commentators for the domestic application of international human rights agreements, major changes by United States courts appear unlikely.[173] As an intermediate step, attorneys and judges can cite international human rights documents as persuasive authority in cases such as *MacNamara*. In summarily dismissing international agreements as not self-executing, courts abdicate a duty to protect human rights. Greater domestic application can help bring enforcement of international agreements that courts often dismiss with such adjectives as "transcendent."[174]

The link between United States civil rights laws and international nondiscrimination standards further supports the application of international law. The conventional wisdom has been that provisions in documents such as the United Nations Charter have had little effect on domestic civil rights advances.[175] Domestic courts have maintained this division to avoid addressing human rights provisions in various treaties. The Fifth Circuit, for example, rejected an argument that Title VII was enacted in part to implement the anti-discrimination provisions of the United Nations Charter.[176] The court stated that Title VII is "independent of the Charter" and "was enacted in the domestic interest of the nation."[177]

However, human rights scholar Bert B. Lockwood, Jr. has argued that the human rights provisions of the United Nations Charter *did* influence United States civil rights cases.[178] Focusing on the post-World War II era, Lockwood found that the charter had a "significant impact" on American jurisprudence.[179] After examining cases on California laws that discriminated against Japanese-Americans, he found numerous references to the charter's human rights provisions.[180] For example, in *Oyama v. California*, Justice Black said of the human rights protections of articles 55 and 56: "How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are per-

172. Comment, *Undocumented Workers*, *supra* note 151, at 1730.

173. *See* Lillich, *Invoking International Law*, *supra* note 152, at 384-85; Note, *Evolving the Species*, *supra* note 167, at 200-01.

174. *See* Paust, *supra* note 159, at 499.

175. Lockwood, *supra* note 167, at 902.

176. Spiess v. C. Itoh & Co., 643 F.2d 353, 363 (5th Cir. 1981).

177. *Id.*

178. Lockwood, *supra* note 167, at 915, 948-49.

179. *Id.* at 915.

180. *Id.* at 917-31.

mitted to be enforced?"[181] American courts can help enforce the charter's pledge to oppose discrimination by citing language in the United Nations Charter as well as the words of other individual human rights documents.

2. The Role of Customary International Human Rights Law

In addition to the effects of individually signed treaties, the body of international human rights documents taken as a whole can combine with accepted *practices* among nations to create customary international norms to bind individual nations.[182] A growing body of scholarly work suggests that customary international law binds *all* nations—even if a nation is not a party to the individual treaties.[183]

Thus, international human rights agreements, as an expression of international norms, can have the effect of law, even on nonparties to the agreements.[184] This customary international law does not depend on formal documents, but emerges by consensus when nations conform to international norms.[185]

Such a consensus has emerged regarding international labor standards, particularly those rejecting hiring discrimination based on national origin and gender.[186] "Of all norms in international human

181. *Id.* at 920 (quoting Oyama v. California, 332 U.S. 633, 650 (1948) (Black, J., concurring)).

182. The Paquete Habana, 175 U.S. 677 (1900); *see generally* A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971).

183. *See, e.g.*, MacDougal, Lasswell & Chen, *The Protection of Respect and Human Rights: Freedom of Choice and World Public Order*, 24 AM. U.L. REV. 919 (1975); Sohn, *"Generally Accepted" International Rules*, 61 WASH. L. REV. 1073 (1986); Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983).

184. One district court applied international human rights treaties, even though the United States was not a party, because the treaties indicated "the customs and usages of civilized nations." Fernandez v. Wilkinson, 505 F. Supp. 787, 797 (D. Kan. 1980), *aff'd on other grounds, sub nom.* Rodriguez-Fernandez v. Wilkinson, 564 F.2d 1382 (10th Cir. 1981); *see also* Hartman, *Enforcement of International Human Rights Law in State and Federal Courts*, 7 WHITTIER L. REV. 741 (1985).

185. Comment, *Undocumented Workers*, *supra* note 151, 1730-31. For example, the fact that more than one hundred countries have accepted the Convention on the Elimination of All Forms of Racial Discrimination indicates broad international acceptance of prohibitions against discrimination. *See* UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, U.N. Doc. ST/HR/1/Rev. 1 (1978) [hereinafter UNITED NATIONS, HUMAN RIGHTS].

186. UNITED NATIONS, HUMAN RIGHTS, *supra* note 185; *see also* Universal Declaration of Human Rights, *supra* note 150; Comment, *Undocumented Workers*, *supra* note 151, at 1733-35. Article 2 of the Universal Declaration states that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property,

rights law," one commentator has concluded, "the norm against discrimination is among the strongest."[187] When various treaties incorporate such norms, and the international community adheres to them through repeated practice, they may be enforced in United States courts.[188] Such widely-accepted nondiscrimination standards now deserve greater application in domestic cases such as *MacNamara*.

Recent drafts of the *American Law Institute's Restatement of the Foreign Relations Law of the United States* also support the application of customary international law.[189] Comments to the Restatement indicate that the individual norms set forth in human rights declarations and conventions have become customary international law.[190] One commentator concludes that such customary law supersedes conflicting state laws, and in principle, earlier inconsistent international agreements.[191] Applying this rule to *MacNamara*, the court could have argued nondiscrimination norms create customary international law, which supersedes any provision of the Korean FCN Treaty with which it conflicts. For example, an overly broad reading of the treaty's "of their choice" language would conflict with and be superseded by international nondiscrimination norms.

The application of customary international law has occurred in a number of cases in the United States. The Supreme Court, in *The Paquete Habana*,[192] established that customary international law is a

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birth or other status . . . ." *Id.*; *see also* U.N. CHARTER art. 1. The charter's purposes include "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . ." *Id.* This author does not mean to suggest that such nondiscrimination norms are universally practiced and enforced, only that the standards are pervasive in international documents and treaties that have received broad acceptance.

187. Comment, *Undocumented Workers, supra* note 151, at 1735 (citing Hoffman, *The Application of International Human Rights Law in State Courts: A View from California*, 18 INT'L LAW. 61, 64 (1984)).

188. Note, *Customary International Law, supra* note 151, at 211.

189. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (Tent. Draft No. 6, 1985). Section 102 states in pertinent part:

> (1) A rule of international law is one that has been accepted as such by the international community of states
> (a) in the form of customary law. . . .
> (2) Customary international law results from a general and consistent practice of states followed by them from a sense of obligation.
> (3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.

Id.

190. *Id.* § 701 reporters' notes at 2.

191. Lillich, *Invoking International Law, supra* note 152, at 368.

192. 175 U.S. 677 (1900).

part of United States law, and domestic courts have a responsibility to enforce it.[193] However, courts have shown a reluctance to apply this part of the *Paquete Habana* holding.[194] In 1980, a major advancement in the application of customary law was achieved in *Filartiga v. Pena-Irala*.[195] In *Filartiga*, the Second Circuit held that an act of torture, committed in Paraguay by a Paraguayan police official who later moved to New York, violated established norms of international law.[196] Jurisdiction was based on the Alien Tort Statute,[197] which empowers district courts to hear tort cases committed "in violation of the law of nations."[198] The court cited a number of human rights documents, including the Universal Declaration of Human Rights, as evidence of these international norms.[199]

In determining the law of nations, the *Filartiga* court used a variety of sources in applying customary international law.[200] These included United Nations declarations, domestic constitutions and laws, State Department reports, practices among nations, and scholarly writings.[201] Based on these sources, the court found a universal condemnation of torture.[202] Similarly, international norms protecting basic employment rights have gained support from a wide variety of sources[203] and might have been applied in *MacNamara*.

The Tenth Circuit, in *Rodriguez-Fernandez v. Wilkinson*,[204] reiterated the proposition that United States courts can discern customary international law from such sources as the Universal Declaration and American Convention on Human Rights.[205] Fernandez, a Cuban

193. *Id.* However, the court also stated that customary international law should only be invoked "where there is no treaty, and no controlling executive or legislative act or judicial decision . . . ." *Id.* at 700.

194. Lillich, *Invoking International Law*, *supra* note 152, at 397.

195. 630 F.2d 876 (2d Cir. 1980).

196. *Id.* at 878.

197. 28 U.S.C. § 1350 (1976).

198. *Filartiga*, 630 F.2d at 878, 882.

199. *Id.*

200. *Id.* at 881-84. For evidence of customary international law regarding torture, the court looked to treaty law, including the United Nations Charter, United Nations Declarations, State Department reports, domestic law, and scholarly writings. *Id.*

201. *Id.*

202. *Id.* at 881 ("there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody").

203. *See supra* notes 185-86 and accompanying text; *see also* Comment, *Undocumented Workers*, *supra* note 151, at 1735.

204. 654 F.2d 1382 (10th Cir. 1981).

205. *Id.*

refugee awaiting deportation, argued that his confinement for an indefinite term violated customary international law against arbitrary imprisonment.[206] Although the court of appeals avoided the direct application of customary international law, the court used this law as an interpretive tool to bolster constitutional concepts of due process.[207]

3. Application of International Human Rights Law in *MacNamara*: Strengthening the Rationale

The *MacNamara* court could have buttressed its holding by incorporating international human rights law. Although at least one author has urged caution in invoking international human rights law to avoid a "backlash,"[208] such law supports interpreting the Korean FCN Treaty as excluding discrimination based on age and national origin.

As a first step, United States courts could cite international nondiscrimination provisions as persuasive authority, rather than as an independent basis for a decision.[209] In *MacNamara*, international authority could have been used to support Title VII requirements to counter KAL's argument that the Korean FCN Treaty shielded the airline from discrimination claims.[210] As one human rights author has observed of cases involving undocumented workers: "Though domestic and international law theories both suffer shortcomings if invoked independently, they appear encouragingly acceptable when combined."[211] Instead of relying on a purely historical treaty analysis, the *MacNamara* court might have noted the parallels between Title VII and portions of the Universal Declaration of Human

206. *Id.* at 1388.

207. The court stated that "[d]ue process is not a static concept, it undergoes evolutionary change to take into account accepted current notions of fairness. Finally, we note that in upholding the plenary power of Congress over exclusion and deportation of aliens, the Supreme Court has sought support in international law principles." *Id.*

208. Lillich, *Invoking International Law*, *supra* note 152, at 401, 410.

209. *Id.* at 410. Lillich states:

> If international human rights lawyers today not only argue that the human rights clauses in the UN Charter are self-executing, but also invoke them indirectly in a manner that gradually increases the judiciary's consciousness of their existence and, perhaps more importantly, their potentially enlightening influence, chances are that the results sought by the intermediary appellate court in *Fujii* eventually will be achieved, albeit through [an] indirect route.

Id.

210. *MacNamara*, 863 F.2d at 1138.

211. Comment, *Undocumented Workers*, *supra* note 151, at 1744-45.

Rights.[212] Such human rights agreements can rebut claims that an FCN treaty allows hiring discrimination based on national origin.

In addition to citing individual agreements signed by the United States or Korea, the *MacNamara* court could have "infused"[213] *customary* international law with Title VII. An expansive reading of the treaty's employment provision in *MacNamara* is repugnant to worldwide nondiscrimination norms and arguably violates customary international law.[214] If a series of multilateral human rights agreements does not prevail over individual FCN treaties, then nations could simply avoid international human rights law and discriminate via these bilateral agreements.[215] Courts can better interpret bilateral agreements by scrutinizing provisions that are inconsistent with customary international law.

4. Benefits of Incorporating International Human Rights Standards in Domestic Decisions

In addition to freeing courts from complex and unreliable analyses of treaty histories, incorporating international human rights law offers a number of benefits. It can counter charges that American courts have a national bias; it can give meaning to human rights standards; and it can help diminish the flight of capital to countries that rigidly control their workers.

Incorporating international human rights law in cases such as *MacNamara* would help deflect charges that United States courts simply impose American cultural and legal standards on foreign parties. With more foreign capital flowing into the United States, a greater

212. Both documents reject discrimination based on sex, race, and national origin. *See supra* notes 3, 186 and accompanying text.

213. One author argues that the term "incorporation" incorrectly suggests that concepts found in international human rights law are outside the scope of domestic law. Comment, *Undocumented Workers*, *supra* note 151, at 1736-41. He prefers "infusion," arguing the term explains that international law simply illuminates principles already expressed in the United States Constitution. *Id.*; *see also* Lillich, *Invoking International Law*, *supra* note 152, at 408-12.

214. Courts will generally presume that treaty parties did not intend to violate basic principles of international law. *See, e.g.*, Nielsen v. Johnson, 279 U.S. 47, 55-57 (1929); Geofroy v. Riggs, 133 U.S. 258, 268 (1890); Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889); Wildenhus's Case, 120 U.S. 1, 11-14 (1887); The Amistad, 40 U.S. (15 Pet.) 518, 594-95 (1841).

215. International law followed by customary practice between nations, subsequent to an inconsistent treaty provision, may prevail as United States law. *See* RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 135, reporters' note 4 at 83 (Tent. Draft No. 6, 1985).

number of employment-related lawsuits involving foreign owners can be expected.[216] In resolving these disputes, courts that cite international standards can enhance foreign acceptance of United States decisions and also minimize retaliatory measures.

For example, in *MacNamara*, KAL argued that the United States reneged on a contract between nations because the United States chose to reject the plain meaning of the FCN treaty.[217] KAL suggested that the United States government was imposing modern United States social mores rather than adhering to the terms of the treaty.[218] Other trading partners may respond to this American nationalism by imposing their own standards, thereby weakening treaty agreements.[219] One scholar concludes that "infusion offers a way out of the judicial provincialism that occurs when courts fail to use sources of international law in defining 'universal' rights."[220]

Another benefit of applying international human rights law is the greater protection of human rights worldwide. Though some human rights documents may not be considered binding or self-executing, the standards they contain are given meaning when applied in domestic courts.[221] Using international human rights law to supplement domestic court decisions serves as an intermediate step toward greater enforcement of that law. By acknowledging international human rights standards, United States courts can play a vital role in their acceptance and enforcement.[222]

United States support for international standards of nondiscrimination in employment also helps remove a competitive advantage gained by some developing nations.[223] By maintaining a docile and inexpensive work force, countries such as South Korea have attracted

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216. *See supra* note 1 and accompanying text.

217. Brief for Appellee at 34, MacNamara v. KAL, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1741).

218. *Id.* at 22. KAL also raised the specter of anti-Oriental prejudice by American factfinders "in this era of 'Japan-bashing.' " *Id.* at 36.

219. Note, *Title VII of the Civil Rights Act of 1964 and the Multinational Enterprise*, 73 GEO. L.J. 1465, 1497 (1985) [hereinafter Note, *Multinational Enterprise*]; *see also* Lansing & Palmer, *supra* note 139, at 168.

220. Comment, *Undocumented Workers*, *supra* note 151, at 1738.

221. *Id.*

222. *See* R. FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW 212-35 (1981). Fisher argues that weaving international law into domestic law may practically be the only way to enforce the international rules, especially when there is no possibility of relief in their own country.

223. Note, *Missing Link*, *supra* note 151, at 452-55.

multinational corporations and reduced the prices of their exports.[224] Leveling the playing field in the international workplace through worldwide enforcement of labor rights should limit the flight of capital from developed nations.[225]

The Third Circuit in *MacNamara* offered a variation of this fair trade argument that advantages based on discrimination should be eliminated. It concluded that if the FCN treaty was read to grant South Korea immunity from Title VII, South Korean corporations would gain an unfair competitive advantage over domestic employers.[226] The court added that "defending personnel decisions is a fact of business life in contemporary America and is a burden that the domestic competitors of foreign enterprise have been required to shoulder."[227]

When nations gain a competitive edge based on discriminatory practices and suppressed wages, they can worsen working conditions in other countries as well.[228] To compete, other nations are forced to reconsider their fair employment standards. The United States should question whether it is encouraging countries that use oppressive employment practices by providing them free access to United States markets.[229]

In South Korea, massive foreign debt and the vulnerability of an export-based economy has led to authoritarian controls over labor.[230] As one commentator put it, "in assessing the expectations of foreign creditors and potential investors, whose capital and technology were needed for South Korean development, [South Korean leaders] viewed social stability, especially non-confrontational labor relations, as a *sine qua non* of rapid industrial progress."[231] Korean women, who earn less than half as much as men and do the most repetitious

224. *Id.* For an excellent source on South Korean labor practices, see West, *South Korea's Entry into the International Labor Organization: Perspectives on Corporatist Labor Law During a Late Industrial Revolution*, 23 STAN. J. INT'L L. 477 (1987).

225. *See generally* POSNER, ECONOMIC ANALYSIS OF THE LAW 553-54 (2d ed. 1977); WALTER, INTERNATIONAL ECONOMICS 180-87 (2d ed. 1975); *see also* Note, *Missing Link*, *supra* note 151, at 452-55.

226. *MacNamara*, 863 F.2d at 1146.

227. *Id.* at 1147.

228. *See* Note, *Missing Link*, *supra* note 151, at 453.

229. *Id.* at 454-55; *see also* Kerson, *Prisoners & Profit: How American Workers Lose Their Jobs to Union-Busting in Foreign Countries*, in SOLIDARITY (1985); *Worker Rights and Foreign Trade*, AFL-CIO Am. Federationist, Nov. 8, 1986, at 8.

230. West, *supra* note 224, at 492.

231. *Id.*

work, have suffered particularly under these labor policies.[232] Such practices can be countered through the greater enforcement of international fair employment standards.

5. Trade Implications

KAL, in its petition for a writ of certiorari to the Supreme Court, argued that the specter of defending its choice of executives in local United States courts would discourage foreign investment.[233] In defending the district court's decision against MacNamara, KAL argued that "by providing a measure of certainty on this issue, the District Court's approach enhances a corporation's ability to manage and control its overseas investment. It thus goes a long way to promote the trade and investment objectives which are at the heart of the Treaty."[234] Other writers argue that a narrow reading of the FCN treaty employment provision undermines free trade by limiting managerial and hiring controls over foreign operations.[235] Similarly, some authors associate the imposition of United States fair employment standards with trade protectionism.[236] They argue that having to defend hiring decisions is simply one more burden that will limit foreign investment and increase United States unemployment rates and trade deficits.[237]

However, much of the alleged threat to foreign investment in the United States from domestic nondiscrimination laws is overstated. First, growing investment in the United States[238] indicates the relative

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232. *Id.* at 529-32. West states:

> At present, the Government pressures workers in just the opposite direction, exhorting them to work longer hours "in the national interest" and praising "voluntary" sacrifices in *Saemaul* indoctrination sessions. . . .
>
> The charge that South Korea has based its economic miracle partly on the ruthless exploitation of teenage girls has enough truth to it to shock many outside observers; the response that other states did the same in the past is simply not a sufficient excuse today.

Id. at 529, 532.

233. MacNamara v. KAL, 863 F.2d 1135 (3d Cir. 1988), *petition for cert. filed*, Oct. 30, 1989 (No. 88-1849).

234. Brief for Appellee at 41, MacNamara v. KAL, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1741).

235. *See, e.g.*, Note, *Subsidiary Assertion of Foreign Parent Corporation Rights Under Commercial Treaties to Hire Employees "Of Their Choice,"* 86 COLUM. L. REV. 139, 162-63 (1986) [hereinafter Note, *Subsidiary Assertion*].

236. Lansing & Palmer, *supra* note 139, at 153-54; *see also* Note, *Multinational Enterprise*, *supra* note 219, at 1497; Note, *Subsidiary Assertion*, *supra* note 235, at 162-68.

237. *Id.* at 167-68. For a discussion of trade barriers, see C.M. SCHMITTHOFF, THE SOURCE OF LAW OF INTERNATIONAL TRADE 228 (1964).

238. *Foreign Direct Investment*, *supra* note 1.

attractiveness and perceived strengths of the United States economy. Among the factors considered by foreign investors, such as anticipated growth and profits, the inability of a foreign employer to discriminate in hiring executives should have little relative influence. Foreign corporations would still be able to exercise great flexibility in managing their own affairs, despite protestations to the contrary.[239] The State Department, in recent bilateral investment treaties, supports holding foreign employers to domestic standards, apparently with little fear of a flight of foreign capital.[240] Furthermore, domestic corporations have prospered, despite having to meet Title VII's nondiscrimination standards.

One commentator concludes that such nondiscrimination standards promote "fair trade" and are mislabeled as "protectionist."[241] He defines fair trade as "trade which does not rely on artificially depressed labor conditions to gain competitive advantages."[242] Similarly, the *MacNamara* court argued that protection of foreign companies from Title VII claims provides an unfair competitive advantage.[243] One commentator concludes that "[c]omplying with U.S. fair employment laws must be seen as just another cost of doing business abroad."[244] In its efforts to join the ILO, South Korea indicated it is ready to acknowledge and adopt several of these international fair employment standards.[245]

Free trade proponents should keep in mind that "trade is not an

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239. Brief for Appellee at 34-36, MacNamara v. KAL, 863 F.2d 1135 (3d Cir. 1988) (No. 87-1741). KAL placed the discussion in terms of control of overseas investment, suggesting such control would be lost entirely if corporations were required to defend key personnel decisions in court. *Id.*

240. More recent commercial treaties, the bilateral investment treaties ("BIT"), avoid the Title VII conflict. For example, the BIT between the United States and Egypt states:

> [N]ationals and companies of either Party, and their companies which they own or control in the territory of the other Party, shall be able to engage the managing director of their choice. Further, *subject to the employment laws of each Party*, nationals and companies of either Party shall be permitted to engage, within the territory of the other Party, professional and technical personnel of their choice, for the particular purpose of rendering professional, technical and managerial assistance necessary for the planning and operation of investments.

Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, United States–Egypt, art. 5(b), *reprinted in* 21 I.L.M. 927, 933 (1982) (treaty unratified) (emphasis added).

241. Note, *Missing Link*, *supra* note 151, at 459-61.

242. *Id.* at 460.

243. *MacNamara*, 863 F.2d at 1147.

244. Street, *International Commercial and Labor Migration Requirements as a Bar to Discriminatory Employment Practices*, 31 HOWARD L.J. 497, 539 (1988).

245. *See generally* West, *supra* note 224.

end in itself, that its function is to improve the living standards of workers as well as of consumers and manufacturers."[246] Should the United States ignore the body of international law that rejects discrimination, as well as its own employment laws, for the cause of unfettered free trade? As a world leader, the United States has a responsibility to promote human rights which overrides the dubious free-trade benefits of insulating foreign corporations from United States fair employment laws.

V. CONCLUSION

Foreign companies, operating in the United States in greater numbers, bring with them conflicting cultural and legal standards regarding the treatment of employees. The degree to which these foreign employers will be held to United States and international fair employment standards will be decided in part by American courts. *MacNamara* illustrates how the Third Circuit resolved one such conflict by favoring United States nondiscrimination laws and interpreting the Korean FCN Treaty as providing only narrow protections for foreign employers.[247]

However, the court's analysis sidestepped both the plain language of the treaty and a realistic history of its drafting.[248] The *MacNamara* court, in adopting the simplistic historical analysis of the State Department, strained to conclude that the treaty and Title VII did not collide, but simply sideswiped each other.[249] The unstated objective of both the court and the United States government appears to be the imposition of current United States employment policies, which have undergone numerous advances since the 1957 treaty ratification.[250] After stating that its role was to enforce the intent of the two treaty partners, the court ignored the views of the South Korean government.[251]

The court's analysis illustrates the manipulability of treaty interpretation methods. Vague, general treaty language is often indeterminate without contextual information.[252] Additionally, negotiation and Senate ratification histories typically contain conflicting state-

246. Note, *Missing Link*, *supra* note 151, at 455.
247. *MacNamara*, 863 F.2d at 1135.
248. *See supra* text accompanying notes 73-102.
249. *MacNamara*, 863 F.2d at 1146-47.
250. *See supra* text accompanying notes 140-42.
251. *See supra* text accompanying notes 132-34.
252. Comment, *Jurisprudence*, *supra* note 116, at 1063.

ments and carry a pro-American bias.[253] To interpret a treaty based on an exchange that occurred forty years earlier between self-serving diplomats and uninformed Senators is unreliable at best.

The use of accepted international human rights standards as interpretive tools can help legitimize this process. In *MacNamara*, for example, the court might have incorporated a discussion of international nondiscrimination standards in employment.[254] Though these standards are not universally practiced, the United States and South Korea are parties to treaties and declarations which contain them.[255] Collectively, individual human rights agreements and accepted norms create customary international law that can bind nations and also serve as a persuasive element in United States court decisions.

Application of international law in cases such as *MacNamara* can help deflect the charge of judicial provincialism by extending the courts' analysis beyond United States legal and cultural standards.[256] In addition, promoting international fair employment standards can diminish the competitive advantages some nations gain through the rigid control of their workers.[257] Ultimately, the infusion of international human rights law with United States nondiscrimination standards will result in a greater acceptance and enforcement of human rights.

*Greg Warnagieris**

253. *Id.* at 1036-41.
254. *See supra* text accompanying note 208.
255. *See supra* text accompanying notes 146-52.
256. *See supra* text accompanying notes 208-12.
257. *See supra* text accompanying notes 215-24.

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